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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

BRIAN SIMMONS, and RALPH STANTON,

Plaintiffs-Requesters,

v.

UNITED STATES DEPARTMENT
OF ENERGY,

Defendant.

No.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF UNDER THE
FREEDOM OF INFORMATION ACT

Come now Plaintiffs Brian Simmons and Ralph Stanton and allege as follows:

I. NATURE OF THE ACTION

On November 8, 2011, workers at the Idaho National Laboratory (INL), Materials and Fuels Complex (MFC) Zero Power Physics Reactor (ZPPR) Facility, were packaging plutonium (Pu) reactor fuel plates. Two of the fuel storage containers had unusual labels indicating potential abnormalities with the fuel plates located inside. When INL workers opened one of the storage

1 containers, they discovered a plutonium fuel plate wrapped in plastic and tape. When the workers
2 attempted to remove the wrapping material, an uncontrolled release of radioactive contaminants
3 occurred, resulting in the contamination of 16 workers and the facility, including Plaintiffs Brian
4 Simmons and Ralph Stanton. The sequence of events leading up to the release of contaminants,
5 the uncontrolled release itself, and the emergency response at the ZPPR facility were all recorded
6 on video.

7 At the time of the plutonium release, the INL nuclear operators were employed by
8 Battelle Energy Alliance, LLC ("Battelle"), a private entity under contract with the U.S.
9 Department of Energy ("DOE") which, as of 2005, had taken over operations of the MFC and
10 other facilities at the INL. On January 4, 2012, the DOE's Office of Nuclear Energy issued an
11 "Accident Investigation Report" about the plutonium release ("Report"). It concluded that the
12 release was "preventable" and determined that both the DOE Idaho Office and Battelle bore
13 responsibility for various root causes for the contamination of the ZPPR nuclear operators.

14 In May 2013, Plaintiffs requested various documents under the Freedom of Information
15 Act ("FOIA") concerning the incident and their exposure to radioactive contamination. Though
16 some material was produced, on May 9, 2013, the DOE Idaho Office withheld, on purported
17 "privacy" grounds, all video regarding the plutonium contamination incident, including footage
18 that presumably captured the contaminant release itself and the emergency response. This is
19 video the DOE's Office of Nuclear Energy obtained during the course of its investigation and
20 relied on as a "unique opportunity to observe the entire work process taking place at the time of
21 the accident."

22 On June 12, 2013, the DOE Idaho Office shifted its withholding rationale and claimed
23 that the videotape was not "an agency record." But the DOE Idaho Office also asserted, in the
alternative, various substantive reasons for not releasing the tape, including (again) purported
"privacy" grounds. Plaintiffs timely filed an administrative appeal. On July 17, 2013, the
DOE's Office of Hearings and Appeals rejected this appeal, finding that Battelle had "generated"

1 the tape and used it for its “employee-related” investigation and concluding (erroneously) that
 2 the tape was thus “not an agency record.”

3 This lawsuit seeks to compel production of all video related to the November 8, 2011
 4 plutonium release at the ZPPR facility. All such video is an agency record of the DOE for
 5 purposes of FOIA. The DOE obtained the tape and in its Report relied on it as fundamental
 6 evidence that both the DOE and Battelle breached DOE safety standards. There are no
 7 cognizable privacy interests in the mere images of other unidentified INL workers depicted in the
 8 video. At minimum, any privacy interests are outweighed by the public interest in accessing
 9 video representation of the actual release, especially where the Accident Investigation Report
 10 repeatedly referenced the video as depicting the safety planning and response flaws that the
 Report criticized as contributing to the cause of the “preventable” contamination.

11 II. PARTIES

12 2.1 Plaintiff Brian Simmons is a resident of Bonneville County and the District of
 Idaho.

13 2.2 Plaintiff Ralph Stanton is a resident of Bonneville County and the District of
 14 Idaho.

15 2.3 Defendant U.S. Department of Energy (“DOE”) is an agency of the United States
 16 and has possession and/or control of the requested records at issue in this lawsuit.

17 III. JURISDICTION AND VENUE

18 3.1 The Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
 19 Venue is proper in the District of Idaho under 5 U.S.C. § 552(a)(4)(B) because Plaintiffs reside
 in this District and the requested agency records are situated in this District.

20 3.2 Plaintiffs timely filed an administrative appeal of the DOE Idaho Office’s
 21 withholding of the videotape. This appeal was denied on July 17, 2013 by the DOE’s Office of
 22 Hearings and Appeals. Plaintiffs have thus exhausted any administrative remedies.

23 IV. FACTS

4.1 *The November 8, 2011 Release of Radioactive Contaminants at the ZPPR Facility.*

1 4.1.1 Plaintiffs are nuclear operators at the Idaho National Laboratory (INL). They are
2 employed by Battelle Energy Alliance, LLC (“Battelle” or “BEA”), which is the current day-to-
3 day operator of the INL facility, including the Materials and Fuels Complex (MFC) and the Zero
4 Power Physics Reactor (ZPPR) Facility. In 2005, the DOE transferred to Battelle the
5 management and operation of these facilities, which, according to the DOE, “supports important
6 national goals in advanced nuclear energy technology research and development and other
7 energy science initiatives as part of nuclear energy, defense, and environmental management
8 programs.”

9 4.1.2 The ZPPR Facility is located within the MFC. It has a Vault for nuclear material,
10 equipment and facilities for handling surveillance and inspection, and a Workroom for packaging
11 and processing when nuclear material is received or to be shipped.

12 4.1.3 On November 8, 2011, INL workers discovered several “clamshell” containers
13 with plutonium (Pu) reactor fuel plates at the MFC/ZPPR facility. As later described by the
14 DOE, two of the “containers had atypical labels indicating potential abnormalities with the fuel
15 plates located inside.” Specifically, the labels read: “CAUTION: RADIOACTIVE
16 MATERIAL” and that Clamshell 47 contained: “1-Plate Dented/1-Plate C ≤ 10 d/m/plate α & is
17 wrapped in plastic.”

18 4.1.4 The INL nuclear operators consulted the Shift Supervisor, who in turn consulted
19 with the Nuclear Facility Manager. The supervisors instructed the workers that the packaging
20 operation should proceed. INL operators took four of the “clam shell” containers into the ZPPR
21 Workroom and discovered one of the Pu fuel plates wrapped in plastic and tape. The workers
22 attempted to remove the plastic wrapping material by cutting into it and precipitated an
23 uncontrolled release of plutonium, resulting in the contamination of 16 workers and the facility,
including Plaintiffs Brian Simmons and Ralph Stanton.

24 4.2 **The DOE’S Accident Investigation Report.**

25 4.2.1 On January 4, 2012, the DOE’s Office of Nuclear Energy issued an “Accident
Investigative Report” (“Report”) about the November 8, 2011 plutonium release. It concluded

1 that the release was “preventable” and determined that both the DOE Idaho Office (“DOE-ID”)
2 and Battelle bore responsibility for various root causes of the contamination.

3 4.2.2 The “local root causes” included: (1) “BEA did not accurately analyze the Pu
4 hazard in the safety basis and establish commensurate controls”; and (2) “The management
5 system lacked requirements intended to influence the decision making of the NFM and SS,
6 resulting in a single-point decision to cut the wrapping.”

7 4.2.3 The “systemic root causes” included: (1) “DOE-ID accepted the risk of known
8 safety basis deficiencies and allowed continued operation of the ZPPR Facility within the
9 framework of a multi-year safety basis upgrade plan without putting effective interim controls in
10 place”; and (2) “BEA continued operation of the ZPPR Facility with known safety basis
11 deficiencies and without adequately analyzing the hazard to the worker or establishing effective
12 work control processes.”

13 4.2.4 The Report also found, as a contributing cause, that on May 30, 2003, before the
14 DOE subcontracted the operation and management of the MFC to Battelle, an Associate
15 Laboratory Director had issued a report entitled “Fissile Material Control Noncompliances of
16 ZPPR.” This report noted that one root cause of the “noncompliances” pertained to
17 “management deficiencies,” including more specifically “concerns with the lack of Pu-specific
18 training and surveillance.” The Report further found that when, by January 14, 2005, the MFC
19 was transitioned from DOE-ID to Battelle, the Associate Laboratory Director made several
20 recommendations relevant to the November 8, 2011 contamination. These included:

- 21 (1) Battelle and DOE failed to improve a safety basis upgrade plan, which resulted in
22 misjudging both the likelihood and the potential severity of the type of radioactive
23 contamination that occurred on November 8, 2011.
- (2) Battelle miscalculated the potential radioactive dose ZPPR workers could receive in
the event of such a release of radioactivity.
- (3) In DOE reports entitled *Transmittal of the INL Transition Report on Nuclear
Facilities Safety Bases* (1/11/2005), and *Independent Safety Review Committee
(IRSC) for the Materials and Fuels Complex (MFC)*, and a white paper (1/26/2009)

1 and report (6/23/2011) by the IRSC Chairman, all expressed historical and on-going
2 concerns about the storage of plutonium fuel plates at the ZPPR facility.

3 Yet Battelle did not incorporate these concerns into its safety basis upgrade plan. The
4 DOE Report concluded: “The treatment of a failed Pu fuel plate hazard and potential accident in
5 BEA’s safety basis is of supreme relevance to this accident investigation, because it ultimately
6 resulted in the lack of additional controls that could have prevented the accident on November 8,
7 2011.”

8 4.2.5 Relevant to the aforementioned safety concerns and the DOE’s root cause
9 analyses, the DOE Report paid special attention to the importance of the video that captured the
10 manner in which the radioactive contaminants were released and Battelle’s emergency response.
11 The DOE Accident Investigation Board remarked that in reaching its conclusions it “examined
12 physical evidence that was directly related to the accident – in particular videotapes provided by
13 the site. Using these recordings, the Board was afforded a unique opportunity to observe the
14 entire work process taking place at the time of the accident.”

15 4.3 **Plaintiffs’ FOIA Requests and DOE Responses.**

16 4.3.1 On or about May 7, 2013, Plaintiffs separately requested from the DOE Idaho
17 Office the following, among other documents: “Copy of the November 8, 2011 videotape of the
18 plutonium contamination incident at the Zero Power Physics Reactor (ZPPR).”

19 4.3.2 On May 9, 2013, Clay Ogilvie, the “FOIA/Privacy Officer” at the DOE Idaho
20 Office, e-mailed in response that the DOE was withholding “the video in full” under the “Privacy
21 exemption (B-6) of the FOIA Act” because it “would violate the privacy of all individuals on the
22 video except yourself.” This email communication was consistent with Plaintiffs’ in-person
23 meeting with Mr. Ogilvie on May 8, 2013 when he advised Plaintiffs that the videotape would
not be made available because of purported “privacy” reasons.

4.3.3 On June 12, 2013, the DOE formally denied the requests for the video in addition
to certain communications between DOE and Battelle, claiming the video was not an “agency

1 record.” Alternatively, the DOE claimed the video would be subject to withholding under 5
 2 U.S.C. § 552(b)(3), (6), and (7), under the following rationale:

3 [T]he videotape involved a recording of a matter specifically exempted from
 4 disclosure under the Atomic Energy Act, includes information the disclosure of
 5 which would constitute a clearly unwarranted invasion of personal privacy and
 6 includes information that, if disclosed, would reasonably be expected to interfere
 7 with enforcement proceedings and/or endanger the life or physical safety of any
 8 individual.

9 4.3.4 Despite requests for clarification, the DOE did not elaborate on which provisions
 10 of the Atomic Energy Act would be violated in the event of disclosure. The DOE similarly did
 11 not specify any of the other alternate bases for withholding, again despite requests for
 12 clarification.

13 4.3.5 On July 3, 2013, Plaintiffs timely filed an administrative appeal. Plaintiffs
 14 contested both the procedural ground for non-disclosure—that the videotape was no “agency
 15 record”—and the alternative substantive grounds, including the DOE’s claim that the videotape
 16 “would constitute a clearly unwarranted invasion of personal privacy.”

17 4.3.6 On July 17, 2013, the DOE’s Office of Hearings and Appeals denied the appeal
 18 on procedural grounds, finding that the videotape is “contractor-owned,” that Battelle had
 19 “generated” the tape and used it for its “employee-related” investigation. Based on these
 20 findings, and at the exclusion of other material factors, the DOE Office of Hearings and Appeals
 21 concluded erroneously that the tape was “not an agency record.”

22 **4.4. The Videotape Is Not an “Agency Record” or Protected Under Any Cited FOIA** 23 **Exemptions.**

4.4.1 The DOE obtained, as part of its investigation, the video recordings of the
 November 8, 2011 contamination release at the INL-ZPPR, and those recordings are now in the
 possession and/or control of the DOE. INL is DOE property. The DOE equipped the entire
 facility, including ZPPR, with video recording devices before it transferred day-to-day operation
 to Battelle in 2005. The DOE also requires that Battelle maintain video surveillance. As such,
 the DOE participated, at least in part, in the creation of the tapes.

1 4.4.2 The DOE can use and dispose of the videotape as it sees fit. This is self-apparent
2 because the DOE Office of Nuclear Energy obtained the tapes as part of its inquiry into the
3 November 8, 2011 incident, which resulted in the “Accident Investigation Report.”

4 4.4.3 The DOE investigators relied on the videotape. According to the Report itself,
5 the videotape was indispensable to the DOE’s ability to reconstruct and analyze the events that
6 precipitated the plutonium release. In reaching its conclusions, the DOE Accident Investigation
7 Board “examined physical evidence that was directly related to the accident – in particular
8 videotapes provided by the site. Using these recordings, the Board was afforded a unique
9 opportunity to observe the entire work process taking place at the time of the accident.”

10 4.4.4 The videotape is an “agency record” under FOIA.

11 4.4.5 The DOE’s withholding of these video recordings as “private” under 5 U.S.C. §
12 552(b)(6) is improper because they are not “personnel [or] medical [or] similar files the
13 disclosure of which would constitute a clearly unwarranted invasion of privacy.”

14 4.4.6 The depiction of the November 8, 2011 release of plutonium material provides, as
15 surmised by the DOE Accident Investigation Board itself, a “unique opportunity to observe the
16 entire work process” that gave rise to this nuclear accident. In light of this unique opportunity,
17 and the overriding interest in affording public oversight over governmental operations and the
18 DOE’s mandate to ensure safety at nuclear facilities, any interest in privacy is outweighed so as
19 to compel production of the video at issue here.

20 4.4.7 The videotape, if disclosed, would not reasonably interfere with enforcement
21 proceedings and/or endanger the life or physical safety of any individual.

22 4.4.8 Disclosure of the videotape will not violate any provision of the Atomic Energy
23 Act.

V. CAUSE OF ACTION

5.1 Incorporating the foregoing allegations herein, Defendant has improperly
withheld agency records in violation the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*

VI. CLAIMS FOR RELIEF

WHEREFORE, the Plaintiffs request relief as follows:

6.1 A declaration from the Court that the Defendant's withholding of the video recordings is unlawful;

6.2 An order compelling Defendant to produce or otherwise make available to Plaintiffs the requested videotape recordings without restriction on use;

6.3 Costs and reasonable attorneys' fees under 5 U.S.C. § 552(a)(4)(E);

6.4 Such other relief as may be just and equitable.

DATED this 15th day of August, 2013.

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